OAH 15-2200-20477-1
Governor's Tracking No. AR 424

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS

FOR THE POLLUTION CONTROL AGENCY

In the Matter of the Proposed Rules of the State Pollution Control Agency Relating to Air and Water Permit Fees, Minnesota Rules, Chapter 7002

REPORT OF THE ADMINISTRATIVE LAW JUDGE

Administrative Law Judge Beverly Jones Heydinger conducted two hearings concerning the above rules beginning at 1:00 p.m. and 6:00 p.m. on July 28, 2009, at the Minnesota Pollution Control Agency's (MPCA or Agency) St. Paul Office, 520 Lafayette Road North, St. Paul, Minnesota. The hearings were broadcast via interactive video conference to the MPCA's offices located in Brainerd, Duluth, Marshall, Rochester, and Detroit Lakes. The hearings continued until all interested persons, groups, and associations had an opportunity to be heard concerning the proposed rules.

The hearing and this Report are part of a rulemaking process governed by the Minnesota Administrative Procedure Act.[1] The legislature has designed the rulemaking process to ensure that state agencies have met all of the requirements that Minnesota law specifies for adopting rules. Those requirements include assurances that the proposed rules are necessary and reasonable, that they are within the agency's statutory authority, and that any modifications that the agency may have made after the proposed rules were initially published are not impermissible substantial changes.

The rulemaking process includes a hearing when a sufficient number of persons request that a hearing be held. The hearing is intended to allow the agency and the Administrative Law Judge reviewing the proposed rules to hear public comment regarding the impact of the proposed rules and what changes might be appropriate. The Administrative Law Judge is employed by the Office of Administrative Hearings (OAH), an agency independent of the MPCA.

Myrna M. Halbach, Director of the MPCA Operational Support Division; Leah M.P. Hedman, Assistant Attorney General; and Jim Brist, MPCA Municipal Division appeared at the rule hearing on behalf of the Agency. Twenty-five members of the public signed the hearing registers, and two members of the public spoke at the 1:00 p.m. hearing.

The MPCA received written comments on the proposed rules before the hearing. After the hearing, the record remained open for five business days, until August 4, 2009, to allow interested persons and the MPCA an opportunity to submit written comments. Following the initial comment period, the record remained open for an additional five

[1] Minn. Stat. §§ 14.131 through 14.20 (2008).

working days to allow interested persons and the MPCA the opportunity to file a written response to the comments submitted. The OAH hearing record closed on August 11, 2009.

SUMMARY OF CONCLUSIONS

The MPCA has established that it has the statutory authority to adopt the proposed rules, that it has complied with the procedures set forth in statute, and that the rules are necessary and reasonable.

Based upon all the testimony, exhibits and written comments, the Administrative Law Judge makes the following:

FINDINGS OF FACT

Nature of the Proposed Rules

1. These proposed rules amend Minnesota Rules chapter 7002 to add new fees for air permit applications, change the fees for water permit applications, and codify changes to water quality annual fees made by legislative action.

2. The MPCA has experienced funding challenges for many years and its fee revenues have not kept pace with the cost of managing air and water quality programs. In the 2002 Legislative Auditor's Report stated:

> State law says that fees should be set at levels that do not significantly over-recover or under-recover the costs of providing services. However, water quality fee revenues cover less than 60 percent of MPCA's staff costs for water-related permitting, compliance monitoring, and enforcement – and this does not include administrative overhead costs or the costs of essential activities such as ambient water monitoring, permit-related rule development, environmental review, and technical assistance.[2]

3. The fees for MPCA water permits have not increased since 2003. In addition, there are currently no air permit application fees.[3] This rulemaking is in response to the 2002 Legislative Auditor's Report and legislative directives in 2007, 2008, and 2009.

4. Under the proposed rules permit fees will be determined based on a point system. Air permit activities will be calculated at $285 per point, and water permit activities will be calculated at $310 per point.

5. The fees generated from the adoption of these proposed rules will be significant for both air and water permit applications. Specifically, under the proposed rules, the water permit application fees would increase from approximately $1,450,000

[2] Statement of Need and Reasonableness (SONAR) at 1.
[3] SONAR at 1, 6.

annually to approximately $3,000,000. And the air permit applications fees would increase from zero to approximately $2,000,000 per year.[4]

6. The Agency began developing these proposed rules in 2007, and went to great lengths to alert the regulated public, the general public, and the Legislature about the development of the proposed rules. During 2007, the MPCA conducted meetings with the Minnesota Chamber of Commerce, the League of Minnesota Cities, agriculture organizations, representatives from small businesses, and certain legislators. The MPCA also undertook an extensive electronic survey of potentially interested parties in order to plan public informational meetings. Ultimately, the MPCA hosted two statewide video conference meetings that included all seven of the MPCA's regional offices.[5]

Rulemaking Legal Standards

7. Under Minn. Stat. § 14.14, subd. 2, and Minn. Rule 1400.2100, a determination must be made in a rulemaking proceeding as to whether the agency has established the need for and reasonableness of the proposed rule by an affirmative presentation of facts. In support of a rule, an agency may rely on legislative facts, namely general facts concerning questions of law, policy and discretion, or it may simply rely on interpretation of a statute, or stated policy preferences.[6] The Agency prepared a Statement of Need and Reasonableness (SONAR) in support of the proposed rules. At the hearing, the Agency primarily relied upon the SONAR as its affirmative presentation of need and reasonableness for the proposed rule. The SONAR was supplemented by a written document and comments made by Agency representatives at the public hearing, and in written post-hearing submissions.

8. The question of whether a rule has been shown to be reasonable focuses on whether it has been shown to have a rational basis, or whether it is arbitrary, based upon the rulemaking record. Minnesota case law has equated an unreasonable rule with an arbitrary rule.[7] Arbitrary or unreasonable agency action is action without consideration and in disregard of the facts and circumstances of the case.[8] A rule is generally found to be reasonable if it is rationally related to the end sought to be achieved by the governing statute.[9]

9. The Minnesota Supreme Court has further defined an agency's burden in adopting rules by requiring it to "explain on what evidence it is relying and how the evidence connects rationally with the agency's choice of action to be taken."[10] An agency is entitled to make choices between possible approaches as long as the choice made is rational. Generally, it is not the proper role of the Administrative Law Judge to determine which policy alternative presents the "best" approach because this would

[4] SONAR at 5-6.
[5] SONAR at 3, 17-19.
[6] *Mammenga v. Department of Human Services*, 442 N.W.2d 786 (Minn. 1989); *Manufactured Housing Institute v. Pettersen*, 347 N.W.2d 238, 244 (Minn. 1984).
[7] *In re Hanson*, 275 N.W.2d 790 (Minn. 1978); *Hurley v. Chaffee*, 231 Minn. 362, 367, 43 N.W.2d 281, 284 (1950).
[8] *Greenhill v. Bailey*, 519 F.2d 5, 19 (8th Cir. 1975).
[9] *Mammenga*, 442 N.W.2d at 789-90; *Broen Memorial Home v. Department of Human Services*, 364 N.W.2d 436, 444 (Minn. Ct. App. 1985).
[10] *Manufactured Housing Institute*, 347 N.W.2d at 244.

invade the policy-making discretion of the agency. The question is rather whether the choice made by the agency is one that a rational person could have made.[11]

10. In addition to need and reasonableness, the Administrative Law Judge must also assess whether the agency complied with the rule adoption procedures; whether the rule grants undue discretion; whether the MPCA has statutory authority to adopt the rule; whether the rule is unconstitutional or illegal; whether the rule constitutes an undue delegation of authority to another entity; or whether the proposed language is not a rule.[12]

Procedural Requirements of Chapter 14

11. On June 16, 2008, the MPCA published a Request for Comments on the proposed rules. The Request for Comments was published at 32 S.R. 2234.

12. By letter dated April 16, 2009, the MPCA requested that the Office of Administrative Hearings schedule a hearing and assign an Administrative Law Judge. Along with the letter, the MPCA filed a proposed Notice of Hearing, a copy of the proposed rules, and a draft of the SONAR. The MPCA also requested that the Office of Administrative Hearings give prior approval of its Additional Notice Plan.

13. On April 20, 2009, at the request of OAH, the MPCA submitted a revised Notice of Hearing to OAH.

14. In a letter dated April 22, 2009, Administrative Law Judge Richard C. Luis[13] disapproved the MPCA's Notice of Hearing on the basis that the Agency's statutory authority to adopt these proposed rules had expired. Given this procedural irregularity, the ALJ declined to consider the proposed Additional Notice Plan.

15. The Agency returned to the Legislature and renewed its statutory authority to adopt these proposed rules.[14]

16. By letter to the Chief Administrative Law Judge dated May 12, 2009, the Agency expressed its intent to republish a Request for Comments due to the revised statutory authority. The Agency requested that the Chief ALJ grant a reduction in the required time period between publication of the Request for Comments and publication of the Notice of Hearing from 60 days to 30 days.

17. In a letter dated May 20, 2009, the Chief ALJ approved this request.

18. The Agency published a Second Request for Comments on the proposed rules on May 18, 2009. The Request for Comments was published at 33 S.R. 1899.

19. By letter dated June 4, 2009, the MPCA requested that the Office of Administrative Hearings schedule a hearing and assign an Administrative Law Judge. Along with the letter, the MPCA filed a proposed Notice of Hearing, a copy of the proposed rules, and a draft of the SONAR. The MPCA also requested that the Office of Administrative Hearings give prior approval of its Additional Notice Plan.

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[11] *Federal Security Administrator v. Quaker Oats Co.*, 318 U.S. 218, 233 (1943).
[12] Minn. R. 1400.2100.
[13] Judge Luis was originally assigned to hear this matter.
[14] *See* Laws of Minnesota 2009, chapter 37, article 1, section 3.

20. On June 19, 2009, at the request of OAH, the MPCA submitted a revised Notice of Hearing to OAH.

21. In a letter dated June 19, 2009, Administrative Law Judge Beverly Jones Heydinger approved the MPCA's revised Notice of Hearing and Additional Notice Plan.

22. On June 22, 2009, a copy of the proposed rules and Notice of Hearing were published in the State Register at 33 S.R. 2086.

23. On June 23, 2009, the MPCA mailed the Notice of Hearing to all persons and associations who had registered their names with the agency for purpose of receiving such notice.

24. On June 24, 2009, the Agency mailed copies of the Notice of Hearing and SONAR to the chairs, chief authors, and ranking minority members of designated legislative committees.[15]

25. On June 25, 2009, the MPCA mailed a copy of the SONAR to the Legislative Reference Library as required by Minn. Stat. § 14.23.

26. On the day of the hearing the following documents were placed in the record:

- The Request for Comments on Planned Amendment to Rules Governing Air Emission and Water Quality Permit Fees, published June 16, 2008, at 32 SR 2234;[16]
- The proposed rule with Revisor's approval dated April 20, 2009;[17]
- The Statement of Need and Reasonableness (SONAR) dated March 2, 2009;[18]
- The Supplemental Statement of Need and Reasonableness dated July 23, 2009;[19]
- Letter dated June 25, 2009, mailing the SONAR to the Legislative Reference Library;[20]
- The Notice or Hearing as mailed on June 23, 2009;[21]
- Certificate of Mailing the Notice of Hearing to the Rulemaking Mailing List on June 23, 2009;[22]
- Certificate of Accuracy of the Mailing List as of March 11, 2009;[23]

[15] *See,* Minn. Stat. § 14.116.
[16] Ex. A.
[17] Ex. C.
[18] Ex. D.
[19] Ex. D.
[20] Ex. E.
[21] Ex. F.
[22] Ex. G.
[23] Ex. G.

- Copy of letter from Administrative Law Judge dated June 19, 2009, approving Notice of Hearing and Additional Notice Plan;[24]
- Public comments received before the hearing;[25]
- Certificate of Sending the Notice and the SONAR to Legislators, dated June 24, 2009;[26]
- Letter to the Commissioner of Minnesota Management and Budget (MMB) dated March 9, 2009, demonstrating compliance with Minn. Stat. § 14.131;[27]
- Letter to Commissioner of Agriculture dated March 9, 2009, demonstrating compliance with Minn. Stat. § 14.111;[28]
- Letter to Commissioner of Transportation dated March 9, 2009, demonstrating compliance with Minn. Stat. § 174.05;[29] and
- Proposed responsive amendments to Minn. R. 7002.0016 and 7002.0250.[30]

27. The MPCA's post-hearing responses, dated August 4, August 11, and August 13, 2009, were also placed into the rulemaking record.

28. Minn. R. 1400.2220, subp. 1 requires the Agency to place certain documents into the hearing record during its presentation at the hearing. The Agency failed to place the following documents into the hearing record:

- The Second Request for Comments published in the State Register on May 18, 2009;
- The Notice of Hearing *as published* in the State Register on June 22, 2009; and
- A certificate of additional notice or a copy of the transmittal letter.

29. Via electronic mail message dated September 1, 2009, the Administrative Law Judge notified the Agency that these documents were missing from the hearing record. On September 8, 2009, the Administrative Law Judge received a copy of the Second Request for Comments and the Notice of Hearing as published in the State Register. On September 9, 2009, the ALJ received the Certificate of Additional Notice indicating that notice was given according to the Additional Notice Plan on June 22, 2009.

[24] Ex. H.
[25] Ex. I.
[26] Ex. K.
[27] Ex. K.
[28] Ex. K.
[29] Ex. K.
[30] Ex. L. This document was submitted to the Administrative Law Judge at the 6:00 p.m. hearing.

30. A procedural defect can be considered a harmless error under Minn. Stat. § 14.15, subd. 5, if the Administrative Law Judge finds that: "(1) the failure did not deprive any person or entity of an opportunity to participate meaningfully in the rulemaking process; or (2) the agency has taken corrective action to cure the error or defect so that the failure did not deprive any person or entity of an opportunity to participate meaningfully in the rulemaking process."

31. The ALJ finds that these procedural defects are harmless errors because the failure to submit these three documents did not deprive any person or entity of the opportunity to participate in this rulemaking. The Second Request for Comments and the Notice of Hearing were published in the State Register on May 18, 2009, and June 22, 2009, respectively. As for the certificate of additional notice, the notice was given on June 22, 2009, according to the Additional Notice Plan approved by the ALJ. The fact that the certificate was not submitted at the hearing was an oversight by the MPCA.

Additional Notice

32. Minnesota Statutes §§ 14.131 and 14.23, require that the SONAR contain a description of the MPCA's efforts to provide additional notice to persons who may be affected by the proposed rules. The MPCA submitted an additional notice plan to the Office of Administrative Hearings, which reviewed and approved it by letter dated June 19, 2009. In addition to notifying those persons on the MPCA's rulemaking list, the MPCA represented that it would implement the following additional notice plan:

- Mail a postcard with information about the Notice of Hearing and proposed rules to 5529 air and water permittees and small business owners and 13 MPCA staff and board members;
- Maintain a website including the Notice of Hearing, proposed rules, SONAR, historical background information, and any comments received from the public; and
- Send email notices to National Pollutant Discharge Elimination Sites (NPDES) permittees, the Air Quality Technical Info list serve, and the Small Business list serve.[31]

33. The Agency gave notice on June 22, 2009, pursuant to the Additional Notice Plan approved by the Administrative Law Judge.

34. The Administrative Law Judge finds that the MPCA fulfilled its additional notice requirement.

Statutory Authorization

35. Minn. Stat. § 116.07, subd. 4d provides that the MPCA can collect fees "to cover the reasonable costs of developing, reviewing, and acting upon applications for agency permits and implementing and enforcing the conditions of the permits pursuant to agency rules."

[31] Letter to Judge Heydinger dated June 4, 2009.

36. In 2007, the Legislature directed the Agency as follows:

> By January 15, 2008, the commissioner shall amend agency rules and, where legislative action is necessary, provide recommendations to the house of representatives and senate divisions on environmental finance on water and air fee changes that will result in revenue to the environmental fund to pay for regulatory services to the ethanol, mining, and other developing economic sectors.[32]

37. Based on this directive, the Agency developed its "Air and Water Fees Legislative Report" by January 15, 2008. The report identified where permit application fee revisions were needed and proposed a structure for addressing those needs.[33]

38. The Agency continued to develop these rules. However, when the Agency did not publish a Notice of Intent to Adopt Rules within 180 days of the effective date of the 2007 legislative directive, as required by Minn. Stat. § 14.125, the authority to adopt these rules expired.

39. During the 2009 legislative session, the Agency requested updated authority to adopt these proposed rules. The Legislature gave the following directive: "The commissioner shall continue the rulemaking process to better align water permit [and air quality] fee revenue for fiscal years, 2010, 2011, 2012, and 2013 with the cost of issuing permits, including environmental review."[34]

40. It is the Agency's position that this authority does not expire after 2013. The Agency believes that it is the intent of the Legislature that the alignment of fee revenue with the cost of issuing permits be an ongoing process beyond the year 2013. The results of this rulemaking will be analyzed over time to determine the need for additional fees and possible future rulemaking. The Agency also relies on its general rulemaking authority under Minn. Stat. § 116.07, which is not time-limited.[35]

41. The wording of the underlying rulemaking authority and subsequent enactments addressing rulemaking could more clearly grant authority for the agency to include all of its administrative costs of operating the air and water permit programs in the fees, including, for example, the costs of ambient monitoring and rulemaking. However, in light of the history of the legislative auditor's report and subsequent statutory enactments, including the 2009 amendment made after the proposed rules were developed, the agency's interpretation of its authority to cover the full costs of its operation of the air and water permit programs is justified. The Administrative Law Judge finds that the MPCA has the statutory authority to adopt the proposed rules.

Regulatory Analysis in the SONAR

42. The Administrative Procedure Act requires an agency adopting rules to consider seven factors in its Statement of Need and Reasonableness. The first factor requires:

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[32] Law of Minnesota 2007, chapter 57, article 1, section 3.
[33] SONAR at 2.
[34] Law of Minnesota 2009, chapter 37, article 1, section 3, subdivisions 2 and 3.
[35] MPCA Post-hearing Comments, dated August 4, 2009, at 6-7.

(1) A description of the classes of persons who probably will be affected by the proposed rule, including classes that will bear the costs of the proposed rule and classes that will benefit from the proposed rule.

According to the Agency, the proposed rules will affect local units of government, agricultural feedlots, and industrial facilities and enterprises. Currently, there are 3,700 air permittees and 16,000 water permittees who will be affected. Those who will both bear the cost and benefit from the proposed rules are businesses and communities that either currently, or in the future, will hold an air quality or water quality permit from the Agency.[36]

(2) The probable costs to the Agency and to any other agency of the implementation and enforcement of the proposed rule and any anticipated effect on state revenues.

The MPCA does not anticipate a significant increase in the cost of implementation of these rules because the permit process is already in place and functioning. However, the MPCA asserts that other state agencies that hold air or water permits will be affected by the increased costs in the proposed rules. Currently, more than 20 state-owned and operated facilities have air or water permits through the MPCA.[37]

(3) The determination of whether there are less costly methods or less intrusive methods for achieving the purpose of the proposed rule.

Due to the directives from the Legislature in 2007, 2008, and 2009, as cited in the discussion of statutory authority above, the MPCA does not believe that there are less costly or less intrusive methods to achieve the required objectives. The MPCA further notes that Minn. Stat. § 116.007, subd. 4d prohibits the over-collection of fees.[38]

(4) A description of any alternative methods for achieving the purpose of the proposed rule that were seriously considered by the agency and the reasons why they were rejected in favor of the proposed rule.

The MPCA researched different fee systems used in other states to cover the regulatory costs of air and water permits. These systems included fees based on: fixed dollar amounts for all permit applications, the capital cost of a project, a point system in correlation with the level of work required to develop a permit, hourly fees, and annual fees versus application fees. Stakeholder groups also viewed this research. Ultimately,

[36] SONAR at 9-11.
[37] SONAR at 11.
[38] SONAR at 11.

the MPCA and a majority of the regulated community agreed that the proposed point system best achieves the outcomes directed by the Legislature.[39]

(5) The probable costs of complying with the proposed rules, including the portion of the total costs that will be borne by identifiable categories of affected parties, such as separate classes of governmental units, businesses, or individuals.

The MPCA projects that the costs of complying with the proposed rules will vary widely based on whether the permit application is for renewal of a current permit or a new permit. The costs will also depend on the permit types, the activities associated with the permit application, the complexity of the project, and the potential impact to public health and the environment. In the SONAR, the MPCA details several different examples of types of municipal, agricultural, and industrial projects and the associated permit costs.[40]

(6) The probable costs or consequences of not adopting the proposed rule, including those costs borne by individual categories of affected parties, such as separate classes of governmental units, businesses, or individuals.

According to the MPCA, the costs or consequences of not adopting these proposed rules is a reduction in Agency resources, delays in the issuance of permits and the projects associated with those permits, and a backlog of permits to be reissued with new environmental limits. The loss of productivity or capacity to grow will vary with the particular situation and the type of applicant, and the MPCA found it difficult to calculate, with any precision, those costs.[41]

(7) An assessment of any differences between the proposed rules and existing federal regulation and a specific analysis of the need for and reasonableness of each difference.

The MPCA points to the requirements of the Clean Air Act. The regulations interpreting that Act (Code of Federal Regulations, Title 40, part 70.9) require that the federal permit program charge fees to owners and operators that are sufficient to cover the permit program costs. The MPCA asserts that the proposed rules are in compliance with federal law and that no differences need to be addressed as to air permits. Concerning water quality and stormwater permits, the MPCA maintains that there are no associated federal regulations that correspond to the state fees rules, so there are no differences to be assessed.[42]

[39] SONAR at 12.
[40] SONAR at 12-13.
[41] SONAR at 14-15.
[42] SONAR at 15-16.

Performance-Based Rules

43. The Administrative Procedure Act[43] also requires an agency to describe how it has considered and implemented the legislative policy supporting performance based regulatory systems. A performance based rule is one that emphasizes superior achievement in meeting the agency's regulatory objectives and maximum flexibility for the regulated party and the agency in meeting those goals.[44]

44. The Agency consulted with stakeholders and considered the idea of using incentives in the form of reduced application fees for facilities demonstrating superior achievement in meeting environmental objectives. After serious consideration, the Agency rejected this idea because the costs involved in implementing such incentives would work against small businesses and governmental units.[45] The Agency noted that it is continually looking for ways to emphasize achievement and flexibility in its rules.

Impact on Farming Operations

45. Minn. Stat. § 14.111 imposes an additional requirement calling for notification to be provided to the Commissioner of Agriculture when rules are proposed that affect farming operations. In addition, where proposed rules affect farming operations, Minn. Stat. § 14.14, subd. 1b, requires that at least one public hearing be conducted in an agricultural area of the state.

46. In the SONAR, the Agency indicated that the proposed rules would have an impact on farming operations and that the Agency would provide the required notification to the Commissioner of Agriculture.[46] Accordingly, the Agency sent a letter to the Commissioner of Agriculture dated March 9, 2009, accompanied by a copy of the proposed rules, the SONAR, an executive summary, and a fact sheet. In the letter, the Agency stated that the proposed rules will impact approximately 1,100 feedlot operations that currently have NPDES permits. The Agency clarified that feedlot operations with fewer than 1,000 animal units will not be charged fees under the proposed rules. The letter contained some examples of how air and water permit fees would be calculated under the proposed rules in various circumstances.[47]

47. The public hearing was broadcast via interactive video conference in several affected agricultural areas of the State.

48. The Administrative Law Judge concludes that MPCA has provided notice in accordance with Minn. Stat. § 14.111.

Impact on Transportation

49. Minn. Stat. § 174.05, subd. 1, requires the Agency to inform the Commissioner of Transportation of all activities which relate to the adoption, revision or repeal of any standard or rule concerning transportation.

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[43] Minn. Stat. § 14.131.
[44] Minn. Stat. § 14.002.
[45] SONAR at 16-17.
[46] SONAR at 8.
[47] Ex. K.

50. The Agency sent a letter to the Commissioner of Transportation dated March 9, 2009, accompanied by a copy of the proposed rules and the SONAR. In the letter, the Agency informed the Commissioner that the proposed rules will change the fees charged for current and future air and water permits held by the Department of Transportation.[48]

51. The MPCA has provided notice in accordance with Minn. Stat. § 174.05, subd. 1.

Consultation with the Commissioner of Finance

52. Under Minn. Stat. § 14.131, the Agency is also required to "consult with the commissioner of finance to help evaluate the fiscal impact and fiscal benefits of the proposed rule on units of local government."

53. The Agency consulted with the Department of Finance (now called Minnesota Management and Budget) on March 9, 2009, by sending the Department copies of the documents sent to the Governor's Office for review.[49]

54. The Administrative Law Judge finds that the Agency has met the requirements set forth in Minn. Stat. § 14.131 for assessing the impact of the proposed rules, including consideration and implementation of the legislative policy supporting performance-based regulatory systems.

Compliance Costs to Small Businesses and Cities

55. Under Minn. Stat. § 14.127, the Agency must "determine if the cost of complying with a proposed rule in the first year after the rule takes effect will exceed $25,000 for: (1) any one business that has less than 50 full-time employees; or (2) any one statutory or home rule charter city that has less than ten full-time employees."[50] The Agency must make this determination before the close of the hearing record, and the Administrative Law Judge must review the determination and approve or disapprove it.[51]

56. The Agency stated that the actual costs to a small business or small city will vary depending upon the type of permit sought, but asserted that it did not anticipate that any small business or small city would be required to spend more than $25,000 in the first year after the proposed rules are adopted. To ensure that the $25,000 amount will not be exceeded in the first year after the rules are adopted, the Agency has included two proposed rule parts, Minn. R. 7002.0021 and 7002.0255, which cap the application fees and additional fees for small businesses and small cities at $25,000.[52]

57. The Administrative Law Judge finds that the Agency has made the determination required by Minn. Stat. § 14.127 and approves that determination.

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[48] Ex. K.
[49] Ex. K; SONAR at 5-6.
[50] Minn. Stat. § 14.127, subd. 1.
[51] Minn. Stat. § 14.127, subd. 2.
[52] SONAR at 9.

Necessity of Adopting or Amending a Local Government Ordinance

58. Effective August 1, 2009, pursuant to Minn. Stat. § 14.128, the Agency must "determine if a local government will be required to adopt or amend an ordinance or other regulation to comply with a proposed agency rule." The Agency must make this determination before the close of the hearing record. The Administrative Law Judge must review and approve or disapprove the agency's determination.[53]

59. The Agency did not make this determination and submit it to the ALJ before the close of the hearing record on August 11, 2009.

60. Via electronic mail message dated September 1, 2009, the Administrative Law Judge notified the Agency that the determination under Minn. Stat. § 14.128 was missing from the hearing record. On September 3, 2009, the Administrative Law Judge received the Agency's determination by electronic mail. According to the Agency, local units of government would not be required to adopt or amend an ordinance because the rules do not require local implementation. The Agency went on to state that the permit fees are paid by permit holders and directly administered by the MPCA; no local units of government are responsible for the collection of MPCA fees.

61. The Administrative Law Judge finds that the Agency has made the determination required by Minn. Stat. § 14.128 and approves that determination.

62. A procedural defect can be considered a harmless error under Minn. Stat. § 14.15, subd. 5, if the Administrative Law Judge finds that: "(1) the failure did not deprive any person or entity of an opportunity to participate meaningfully in the rulemaking process; or (2) the agency has taken corrective action to cure the error or defect so that the failure did not deprive any person or entity of an opportunity to participate meaningfully in the rulemaking process."

63. The ALJ finds that this procedural defect is harmless error because the failure to make this determination did not deprive any person or entity of the opportunity to participate in this rulemaking. Furthermore, this requirement was not in effect at the time that the Agency prepared the SONAR or when the public hearings were held. The determination under Minn. Stat. § 14.128 will be made a part of the rule hearing record for future reference.

Analysis of the Proposed Rules

64. This report is limited to discussion of the portions of the proposed rules that received significant comment or otherwise need to be examined. When rules are adequately supported by the SONAR or the MPCA's oral or written comments, a detailed discussion of the proposed rules is unnecessary. The Agency has demonstrated the need for and reasonableness of all rule provisions not specifically discussed in this report by an affirmative presentation of facts. All provisions not specifically discussed are authorized by statute and there are no other problems that would prevent the adoption of the rules. All comments were read and considered.

[53] Minn. Stat. § 14.128, subd. 1. "Local government" means a town, county, or home rule charter or statutory city.

General Objections to the Proposed Rules

65. The most common objection to the proposed rules was to the increase in fees, especially at a time when the economy is stressed. Commentators worried about increased fees at a time when various industries may already be struggling to stay profitable, and local units of government are strapped for funds.

66. The City of Crookston expressed concern regarding its ability to pay increased permit fees. Crookston worried that increased fees would hamper the City's ability to execute projects that have tangible benefits to the environment. The City suggested that the proposed rules contain a mechanism that takes into account a community's ability to pay the permit fees.[54] The City of Farmington thought it unfair that specific permittees should have to bear the cost of the fees when the general population of Minnesota is benefiting from the program.[55]

67. Xcel Energy and the Iron Mining Association of Minnesota both asserted that as large emission sources, they would bear an unfair burden under the proposed rules. Xcel Energy proposed a phase-out system for companies that reach a certain point total.[56]

68. The MPCA acknowledged the concerns of the commentators, but responded that it was directed by the Legislature to increase its fees. For those applicants concerned about inability to pay the fees, the MPCA noted that a variance provision exists at Minn. R. 7000.7000.

69. It is necessary and reasonable to increase the fees to comply with the Legislature's directive.

Discussion of Proposed Rules

Part 7002.0016, subpart 1

70. Subpart 1 is a new subpart addressing the fees required when an air quality permit application, as follows:

> A person who applies for an air quality permit or permit amendment under chapter 7007, excluding reissuance of individual state or Part 70 operating permits, or who submits an applicability request shall submit with the application or applicability request the appropriate application fee. Failure to submit the fee renders the application incomplete and the agency shall suspend processing of the application until the fee is received. Fees are nonrefundable.

This new language largely reflects the procedure currently in place for water permit applications.[57]

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[54] City of Crookston comment, dated July 28, 2009.
[55] City of Farmington comment, dated July 30, 2009.
[56] Letter from Xcel Energy, dated August 4, 2009, at 1-2; Iron Mining Association of Minnesota comment, dated August 4, 2009.
[57] SONAR at 21.

71. Xcel Energy objected to the Agency's decision to make the fees nonrefundable. Xcel argued that the rules should include a provision for refunding all but a set amount of the fee paid if the applicant or permittee rescinds the request and the anticipated work did not necessitate an increase in staffing levels. Xcel suggested that the amount to be refunded could be based on either a set number of points or a percent of the fee.[58]

72. In response, the MPCA acknowledged that it did consider inserting a refund process into the proposed rules but opted against it for a number of reasons. First, the water quality application fees are not refundable, and the MPCA wishes to maintain consistency between the two processes. Second, the MPCA believes that a nonrefundable fee limits the number of applications that are submitted merely to hold a place in the review queue, which has been a problem for the MPCA in the past. Finally, the MPCA argues that it will have expended staff time regardless of when the application is rescinded, making a refund inappropriate.[59]

73. The Administrative Law Judge finds that the MPCA has shown a rational basis in the record for proposed subpart 1. While the objection to the proposed rule part is valid and thoughtful, it does not establish that the MPCA's choice is irrational. The Administrative Law Judge finds that subpart 1 is needed and reasonable.

74. At the hearing, the MPCA proposed the following change to this subpart to clarify that the fee referenced relates to the application fee and not any additional fees.

> A person who applies for an air quality permit or permit amendment under chapter 7007, excluding reissuance of individual state or Part 70 operating permits, or who submits an applicability request shall submit with the application or applicability request the appropriate application fee. Failure to submit the fee<u>, as specified in 7002.0019, subpart 1,</u> renders the application incomplete and the agency shall suspend processing of the application until the fee is received. Fees are nonrefundable.

75. The Administrative Law Judge finds that this amendment to subpart 1 is needed and reasonable, and does not make subpart 1 substantially different from the rules as published in the State Register.

Part 7002.0019

Subpart 1 – Application points

76. Subpart 1 is a new subpart describing how air quality permit application fees are determined. Subpart 1 lists the types of applications and assigns a point-value to each type. The more complex the application type, the more points assigned to it. The point values are then multiplied by the dollar per point value as determined in part 7002.0018 to calculate the application fee. Point values range from 1 for an administrative amendment to 25 for a major amendment to 75 for an Individual Part 70 permit.

[58] Letter from Xcel Energy, dated August 4, 2009, at 2-3.
[59] MPCA Post-hearing Rebuttal, dated August 11, 2009, at 3-4.

Applicability requests

77. The MPCA proposes to assign 10 points to applicability requests. A permittee makes this type of request when it seeks a determination as to what rules apply to its particular permit application prior to the submission of the application. The MPCA projects that these types of reviews will occur upon promulgation of new rules or regulations that do not yet have a history or precedent set as to application. The Agency anticipates that these types of reviews will often require consultation with the U.S. Environmental Protection Agency (EPA).[60]

78. Xcel Energy worried that this fee may discourage a facility owner or operator from seeking an applicability determination. Xcel asserted that the category should be deleted because the MPCA has other funding sources and applicants should not be required to pay for these types of requests.[61]

79. The Agency responded by stressing that applicability determinations are discretionary on the part of facility owners and also reiterated the remarks in its SONAR. The Agency also noted that the fee would only be charged when the review is formally requested by a facility owner and not when it is done in conjunction with an Agency review.[62]

Major amendments

80. The MPCA assigned 25 points to a major amendment required for significant changes to a facility, such as adding more capacity. According to the MPCA, these types of amendments require extensive review of the applicable rules, calculations, and any new monitoring and reporting requirements.[63]

81. Xcel Energy objected to the assignment of 25 points to a major amendment. Xcel argued that the types of activities covered under the major amendment category are so broad that the MPCA should consider breaking it into two categories.[64] As support for its position, Xcel points to the MPCA's own estimates that the staff hours needed to do a major amendment range from 7 to 594 hours.[65] Xcel suggests that it is not reasonable to charge over $7,000 (25 x $285 = $7,125) for an amendment that consumes few MPCA staff resources.[66]

82. In response, the MPCA stated that creating a system to establish categories of major amendments would be difficult due to the many variations of activities being permitted, and would result in an unnecessarily complicated rule. The MPCA referred back to discussions with stakeholders during the rule development process in which the stakeholders specifically requested that the MPCA avoid a fee-for-hour system.[67]

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[60] SONAR at 29.
[61] Letter from Xcel Energy, dated August 4, 2009, at 3-4.
[62] MPCA Post-hearing Rebuttal, dated August 11, 2009, at 4-5.
[63] SONAR at 29-30.
[64] Letter from Xcel Energy, dated August 4, 2009, at 3.
[65] Ex. F to the SONAR.
[66] Letter from Xcel Energy, dated August 4, 2009, at 3.
[67] MPCA Post-hearing Rebuttal, dated August 11, 2009, at 4.

83. The Administrative Law Judge finds that the Agency has put forth a rational basis in the record for the point assignments in subpart 1. Xcel Energy's objections to two of the point categories are insightful, but the objections do not demonstrate that the Agency's choice is irrational. The Administrative Law Judge finds that subpart 1 is needed and reasonable.

Subpart 2 – Additional points

84. Subpart 2 establishes fees for specific activities that are required for some, but not all, permits. The use of additional points allows the Agency to assign a cost to the permit process that is reflective of the level of Agency staff effort. Stakeholder input during the rule development process revealed that interested parties thought it was important that the fee correspond to the level of effort required to develop a permit. The points assigned under subpart 2 reflect unique review activities that Agency staff must undertake for certain permits.[68]

85. Xcel Energy objected to and requested clarification on several of the listed activities and their corresponding points. In general, Xcel suggested that the fees should be more closely correlated to the amount of time that MPCA staff spend on the permit development. The company also suggested that the proposed fee system would create inequities for certain large permittees, including itself.[69]

86. Specifically, Xcel asserted that the best available control technology (BACT), lowest achievable emission rate (LAER), and plant-wide applicability limit (PAL) reviews would result in disproportionately high fees for the level of work entailed. This is because points are assigned based on the number of pollutants analyzed. As to new source performance standard (NSPS) reviews and national emission standards for hazardous air pollutants (NESHAP) reviews, Xcel supposes that the MPCA uses standard template language in many of these reviews and recommends that this work be covered by the amendment fee in subpart 1. Xcel Energy also proposed that the category for the Clean Air Interstate Rule (CAIR) be deleted because the future application of the CAIR in Minnesota is unclear.[70]

87. The MPCA responded to Xcel's BACT, LAER, and PAL review comments by stating that assessing points per pollutant is reasonable because it most accurately reflects the amount of work done by MPCA staff. As for the NSPS and NESHAP review comments, the MPCA asserts that the templates generated for these types of reviews only provide a limited amount of guidance to MPCA staff. Accordingly, the use of templates does not significantly reduce the time invested by the MPCA. Finally, the MPCA declined to delete the CAIR review category from the proposed rules because no final action has yet been taken by the federal government on its applicability in Minnesota. Based on this uncertainty, the MPCA wishes to leave the category in the proposed rules. If no CAIR reviews are completed, then no additional points will be assessed.[71]

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[68] SONAR at 31-32.
[69] Letter from Xcel Energy, dated August 4, 2009.
[70] Letter from Xcel Energy, dated August 4, 2009, at 2, 4, and 5.
[71] MPCA Post-hearing Rebuttal, dated August 11, 2009, at 3, 5, and 6.

88. Schwartz Farms, Inc., commented that the points associated with environmental assessment worksheet (EAW) review for construction of feedlots with more than 1,000 animal units would have a disparate impact on Minnesota livestock agriculture.[72] Because the State of Iowa does not charge for EAWs, Schwartz Farms opined that the cost of the EAW would discourage producers from investing in the Minnesota livestock industry.[73] Glen Graff of Graff Feedlot expressed similar concerns about the Minnesota livestock industry.[74]

89. The Minnesota Turkey Growers Association also objected to the fees associated with EAW review. This group recommended that Minnesota appropriate funds to cover the MPCA staff costs of permit review because EAW review is undertaken for the public good.[75]

90. In response, the MPCA restated that the proposed rules are based on a directive from the Legislature to the MPCA to collect fees that reflect the services provided for permitting and environmental review.[76]

91. The MPCA noted an error in the proposed rules as published in the State Register and proposed the following amendment to both items E (NSPS review) and F (NESHAP review) at the hearing:

> Points shall be applied for each applicable standard but do not apply to registration, ~~or~~ capped, or general permit applications.

In a Supplemental Statement of Need and Reasonableness provided at the hearing, the Agency stated that the level of review for NSPS and NESHAP reviews for a general permit is limited in scope and occurs when the initial permit is being developed and not when a facility is covered under the general permit. According to the Agency, general permits are more like registration or capped permits and should be excluded from the fees for NSPS and NESHAP reviews.[77]

92. The Agency has responded to the objections to subpart 2 and has shown that the proposed rule is needed and reasonable. In addition, the Administrative Law Judge finds that this amendment to subpart 2, items E and F is needed and reasonable, and does not make subpart 2 substantially different from the rules as published in the State Register.

Part 7002.0022

93. This rule part proposing all new language governs to whom and when the payment of application fees and additional fees is made by permit applicants. This part also clarifies that the permit will not be issued until all invoices have been paid.

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[72] EAW review points are also addressed at proposed rule part 7002.0253, subp. 2, item F, as they relate to water quality permit fees.
[73] Schwartz Farms, Inc. comment, dated July 15, 2009.
[74] Glen N. Graff comment, dated August 4, 2009.
[75] Minnesota Turkey Growers Association comment, dated August 4, 2009.
[76] MPCA Post-hearing Comments, dated August 4, 2009, at 2.
[77] Supplemental Statement of Need and Reasonableness (Supplemental SONAR), dated July 23, 2009, at 2.

94. Between February and June 2009, the Office of the Legislative Auditor (OLA) audited the MPCA. Based upon the findings of that audit, the MPCA proposed the following change to the proposed rules at the hearing:

> Application fees assessed under part 7002.0019, subpart 1, shall be submitted with the application and made payable to the Minnesota Pollution Control Agency. Additional fees assessed under part 7002.0019, subpart 2, shall be paid within 30 days of ~~receipt of any~~ the ~~invoices~~ invoice date from the agency. The person submitting the fee shall make the payment as directed in the invoice. Final action on the permit shall not be taken until all invoices are paid.[78]

95. The MPCA asserts that establishing that the applicable fees are due within 30 days of the invoice date, and not within 30 days of the date of receipt of the invoice, creates a more verifiable system for the calculation of late fees. The MPCA insists that this change will address the concerns of the OLA and help resolve the financial weaknesses identified by the OLA.[79]

96. The MPCA seeks to make similar changes to the proposed rule text at Parts 7002.0023, 7002.0065, 7002.0075, 7002.0085, 7002.0258, 7002.0270, and 7002.0290.[80]

97. The Administrative Law Judge finds that these changes are needed and reasonable. The MPCA has demonstrated a rational basis in the record, and these changes to the proposed rules would not make the relevant rule parts substantially different from the rules as originally published in the State Register.

Part 7002.0065

98. This rule part involves the payment of annual fees. The proposed rule changes the timeline for payment of these fees from 60 days to 30 days from the date of the invoice. The MPCA sought this particular change to create consistency throughout the proposed rules. All other payment timelines in the proposed rules are for 30 days from the invoice date. The MPCA reasoned that if one timeline was different from all the others, the potential for confusion and error increases with the regulated parties.[81]

99. Xcel Energy objected to this proposed change as burdensome. Xcel argued that its invoices regarding air and water fee permits can total as much as $3 million to $4 million. When the invoice amounts are not known ahead of time, Xcel asserts that 30 days is often not enough time to make the payment.[82]

100. The MPCA reiterated and responded that it selected 30 days as a consistent time frame between air and water fee programs so that it is able to meet it financial obligations more efficiently and, as a result, reduce overhead costs. The

[78] Supplemental SONAR, at 3.
[79] Supplemental SONAR, at 2.
[80] Supplemental SONAR, at 3-5.
[81] SONAR at 41.
[82] Letter from Xcel Energy, dated August 4, 2009, at 5.

MPCA reasoned that since invoicing will only be required for assessing additional points, the permittees will make payment a priority.[83]

101. The Administrative Law Judge finds that the MPCA has put forth a rational basis for its proposed change to part 7002.0065. As further support for the MPCA's position, it should be noted that the current rules provide that late fees are not assessed until 60 days from the date of the invoice.[84] That late fee procedure is not proposed for change. Nevertheless, Xcel Energy has advanced an argument that the MPCA should consider prior to adopting the proposed rules. The MPCA may wish to consider adopting a 60-day payment timeline in this rule part, or allowing 60 days for payments exceeding a certain amount. Such a change would be needed and reasonable and would not make part 7002.0065 substantially different from the rules as originally published in the State Register.

Part 7002.0250, subpart 1

102. For the reasons stated above under the discussion of Part 7002.0016, subpart 1, the Agency also proposed the following similar change to this rule part at the time of the hearing:

> . . . Failure to submit the fee<u>, as specified in 7002.0253, subpart 1,</u> renders the application incomplete and the agency shall suspend processing of the application until the fee is received. Application fees are nonrefundable.

103. The Administrative Law Judge finds that such a change to subpart 1 is needed and reasonable and would not make subpart 1 substantially different from the rules as originally published in the State Register.

Adjusted Fee Target

Parts 7002.0017 and 7002.0251

104. These two proposed rule parts describe how the air (part 7002.0017) and water (part 7002.0251) quality permit fee targets are set and under what conditions those targets will increase or decrease. The unadjusted fee target is based on the 2007 appropriation from the Legislature; $4,000,000 per biennium for air permitting and $6,000,000 per biennium for water permitting. These funds are used for regulatory needs, particularly permitting for mining, ethanol, air, water, and multi-media. Because it is not possible to predict the number of permit applications, and resulting revenue, that the MPCA will receive, the MPCA acknowledges that it may under-collect or over-collect in any given biennium. Accordingly, the Agency has proposed rules to address and remedy this situation. The target will be adjusted based on two factors: 1) the amount of permit fees collected in the previous biennium, and 2) inflation. The MPCA chose to use the proposed formulas in lieu of having to pursue rulemaking each time it may need to amend the fee target in the future.[85]

105. Several commentators objected to the fee targets and questioned whether the MPCA had fully considered the possibility of reduced permit applications and the

[83] MPCA Post-hearing Rebuttal, dated August 11, 2009, at 6.
[84] *See* Minn. R. 7002.0085.
[85] SONAR at 22-23, and 44.

effect that could have on future permit fees. The commentators expressed that it is not fair for air and water permit application fees to fluctuate based on agency funding targets.[86] Christensen Farms noted the current economic downturn and questioned whether permit applications could remain at their current level. Decreased permit applications would lead to a rapid and significant increase in the cost per point for fees, which would further depress the number of permit applications. Christensen Farms suggested that some control measures be added to the proposed rules to prevent this situation from occurring.[87]

106. The MPCA countered that the analysis presented by these commentators was only partially accurate because the adjustments that will take place under these two proposed rule parts are not based on new applications alone, but on a five-year annual average as shown in proposed rule parts 7002.0018 and 7002.0252. The MPCA projects that a five-year rolling average for the number of permits will keep the value-per-point at a relatively constant number. The MPCA assured the commentators that any significant change to the fee targets would require a new rulemaking.[88]

107. The Administrative Law Judge understands the concerns that the various industries represented here have about the economy. Nevertheless, the Agency has demonstrated that the proposed fee targets at parts 7002.0017 and 7002.0251 are needed and reasonable given the directives stated by the Legislature.

Effective Date

108. When the Agency updated its statutory authority during the 2009 Legislative Session, the Legislature made the following statement: "Fee rules adopted by the agency in fiscal year 2010 are effective retroactively on July 1, 2009."[89] While not stated in the text of the proposed rules, it is the Agency's intent that the effective date be July 1, 2009. The MPCA made the following statement on its website:

> Per 2009 Legislation, new fee rates will be effective on July 1, 2009. Permit applications processed by MPCA after July 1, 2009 and before implementation of the rule are subject to the new fees and will be charged retroactive fees, as necessary.

109. Xcel Energy expressed confusion over the meaning of the phrase "processed by MPCA after July 1, 2009." Xcel then pointed out that on the air quality forms part of the MPCA website, the MPCA states: "Permit applications received by MPCA on and after July 1, 2009, and before implementation of the rule, are subject to the new fees and will be charged retroactive fees, as necessary."

110. The MPCA received several comments on this issue that were similar in nature. The Iron Mining Association of Minnesota and the Minnesota Chamber of Commerce argued that permit applications submitted prior to July 1, 2009, should not

[86] Christensen Farms comment, dated August 4, 2009; Minnesota Turkey Growers Association comment, dated August 4, 2009; and Cold Spring Granite comment, dated July 23, 2009.
[87] Christensen Farms comment, dated August 4, 2009.
[88] MPCA Post-hearing Rebuttal, dated August 11, 2009, at 8-9. MPCA Post-hearing Comments, dated August 4, 2009, at 4-5.
[89] Laws of Minnesota 2009, chapter 37, article 1, section 3, subdivision 1.

be subject to the new permit fees. According to these two associations, fees under these proposed rules should not be applied to either the permit application when it was filed or to additional activities conducted by the MPCA in response to the application. The associations assert that it is unfair to penalize an applicant who submitted an application prior to July 1, 2009, just because the MPCA did not take action on the permit application immediately.[90]

111. The MPCA response to these comments is that applications received by July 1, 2009, will not be charged the new base application fees but will be required to pay any additional fees accrued as a result of review work completed after July 1. As to applications received prior to July 1, 2009, it is the MPCA's position that it has discretion to waive any increase in the application fee as a result of the implementation of the new rules. However, the MPCA believes it does not have discretion to waive additional fees incurred after July 1 for applications received prior to July 1.[91]

112. The Administrative Law Judge finds that the MPCA has created a reasonable distinction between application fees and additional fees as they relate to the July 1 effective date. However, the Administrative Law Judge recommends that the Agency put this language into the text of the proposed rules. Statements made on the Agency's website are not rule language and will not have the force and effect of law. Adding the July 1, 2009 effective date to the rules would reduce confusion and be consistent with the Legislature's 2009 directive. Such a change is needed and reasonable and would not make the rules substantially different.

Based upon the foregoing Findings of Fact, the Administrative Law Judge makes the following:

CONCLUSIONS

1. The MPCA gave proper notice of the hearing in this matter.

2. The MPCA has fulfilled the procedural requirements of Minn. Stat. § 14.14 and all other procedural requirements of law or rule, except as described at Findings 31 and 63. The Administrative Law Judge concludes that these omissions are harmless errors under Minn. Stat. § 14.15, subd. 5.

3. The MPCA has demonstrated its statutory authority to adopt the proposed rule and has fulfilled all other substantive requirements of law or rule within the meaning of Minn. Stat. §§ 14.05, subd. 1, 14.15, subd. 3, and 14.50 (i) and (ii).

4. The MPCA has documented the need for and reasonableness of its proposed rule with an affirmative presentation of facts in the record within the meaning of Minn. Stat. §§ 14.14, subd. 2, and 14.50 (iii).

5. Any Findings that might properly be termed Conclusions and any Conclusions that might properly be termed Findings are hereby adopted as such.

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[90] Iron Mining Association of Minnesota comment, dated August 4, 2009; Minnesota Chamber of Commerce comment, dated August 4, 2009. *See also,* Cold Spring Granite comment, dated July 23, 2009.

[91] MPCA Post-hearing Rebuttal, dated August 11, 2009, at 7. MPCA Post-hearing Comments, dated August 4, 2009, at 5.

Based upon the foregoing Conclusions, the Administrative Law Judge makes the following:

RECOMMENDATION

IT IS HEREBY RECOMMENDED that the proposed rules be adopted.

Dated: September 11, 2009.

/s/ Beverly Jones Heydinger
BEVERLY JONES HEYDINGER
Administrative Law Judge

Reported: Transcribed by Shaddix & Associates (one volume)

NOTICE

The Agency must make this Report available for review by anyone who wishes to review it for at least five working days before it may take any further action to adopt final rules or to modify or withdraw the proposed rules. If the Agency makes changes in the rules, it must submit the rules to the Chief Administrative Law Judge for a review of those changes before it may adopt the rules in final form.

After adopting the final version of the rules, the Agency must submit this version to the Revisor of Statutes for a review as to its form. If the Revisor of Statutes approves the form of the rules, the Revisor will submit certified copies to the Administrative Law Judge, who will then review the same and file them with the Secretary of State. When the final rules are filed with the Secretary of State, the Administrative Law Judge will notify the Agency, and the Agency will notify those persons who requested to be informed of their filing.